(1) Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, ROBERT STEIN, and ROBERT JAQUEZ,

Petitioners,

vs.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.; SANTA FE TERMINAL SERVICES, INC.; SANTA FE PACIFIC CORPORATION; IN-TERMINAL SERVICES, INC.; and MI-JACK PRODUCTS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Richard E. Schwartz
Counsel of Record
James E. Parrot
MIDWEST CENTER FOR LAW & JUSTICE, LLC.
Attorneys for Petitioners
393 N. Euclid Ave., Ste. 300
St. Louis, MO 63108
(314) 454-0022

Thomas V. Girardi
James B. Kropff
GIRARDI & KEESE
Attorneys for Petitioners
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 489-5330

6PP

QUESTIONS PRESENTED FOR REVIEW

1. Is a lower court when importing an analogous state statute of limitation in a case under Section 510 of ERISA free to disregard the "duty" imposed by this Court in *Reed v. United Transportation Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) "to assure that the importation of state law will not frustrate or interfere with the implementation of national policies"?

(a) May a lower court apply a one-year statute of limitation to Section 510 cases in one state after holding that applying a one-year statute in another state would interfere with the federal policy that underlies ERISA?

2. Do the wide disparities between the circuit courts of appeal and among the states within their respective ambits, and the unpredictable results of their efforts to analogize limitations for Section 510 cases, create such confusion and uncertainty as to constitute interference with the implementation of Section 510 or a frustration of the underlying Congressional purpose?

3. Should the Court resolve the difficulties of analogizing under Section 510 by the lower courts by analogizing to other provisions of ERISA and adopting their three-year limitation periods to create a uniform national statute of limitation for Section 510?

(a) In claims such as the Petitioners' involving multiemployers benefits plans, should a uniform federal statute of limitation for Section 510 cases be analogized from ERISA's three-year period under Section 4301 established for multiemployer plan litigation to fulfill the purpose of ERISA to regulate multiemployer plans throughout interstate commerce?

4. Does failure to plead a statute of limitations defense until after remand from the Supreme Court constitute a waiver of the defense or bring the doctrine of equitable estoppel into play?

(a) May a court import and apply a newly-derived state rule of limitation long after a case has begun without also applying that state's rules of waiver and equitable estoppel?

LIST OF PARTIES TO PROCEEDING

Inter-Modal Rail Employees Association, a nonprofit mutual benefit corporation:

Thomas Franks, proposed class-action representative

Charles Jones, proposed class-action representative

Tommie Martin, proposed class-action representative

Hoyt Jarrard, proposed class-action representative

Robert Stein, proposed class-action representative

Refer to Appendix for other IMREA members

The Burlington Northern & Santa Fe Railway Company f/k/a The Atchison, Topeka and Santa Fe Railway Co.

Burlington Northern Santa Fe Corporation

Santa Fe Terminal Services, Inc.

In-Terminal Services, Inc.

Mi-Jack Products, Inc.

Interested parties include the following entities that appeared as *amici curiae* before the Court in its previous consideration of this case (No. 96-491):

U.S. Department of Labor

American Association of Retired Persons

National Employment Lawyers Association

The Employers Group representing nearly 5,000 member employers

The National Association of Manufacturers representing 14,000 member companies and 350 member associations

The Association of American Railroads representing 79 member railroads, including the following:

Alton & Southern Railway
Amtrak
Canadian National
Canadian Pacific
Conrail
CSX Corporation
Illinois Central
Kansas City Southern
Manufacturers Railway
Metra
Norfolk Southern
RailAmerica
RailTex
Texas Mexican Railway
Tri-Rail
Union Pacific (including entities formerly known as Southern Pacific and Missouri Pacific)
Vermont Rail Systems
Winston Salem Southbound Railway
Ferrocarril Mexicano, Special Member
Railway Association of Canada, Special Member
Transportacion Ferroviaria Mexicana, Special Member

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CITATION TO LOWER COURT OPINIONS AND ORDERS

Neither the court of appeals' nor the district court's decisions in this case were published in any reporting system. The Ninth Circuit's unpublished memorandum decision appears at Appendix I. The previous opinion by this Court in this case was reported at 520 U.S. 510 (1997).

STATEMENT OF BASIS FOR JURISDICTION

The court of appeals entered its unpublished memorandum decision on January 21, 2000. That court declined Petitioners' request to publish the memorandum. No Petition for Rehearing was filed.

Petitioners proceed on 28 U.S.C. §1254(1) which confers jurisdiction on this Court to review by Writ of Certiorari the judgment of the Ninth Circuit Court of Appeals.

STATUTES INVOLVED IN THE CASE

29 U.S.C. §1140: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. (ERISA §510).

29 U.S.C. §1113(a)(2): No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of – ... three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. (ERISA §413(a)).

29 U.S.C. §1451(f)(2): An action under this section may not be brought after the later of – ... 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action... (ERISA §4301).

California Code of Civil Procedure §337: Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing ...

California Code of Civil Procedure §338: Within three years: (a) An action upon a liability created by statute, other than a penalty or forfeiture ...: (d) An action for relief on the ground of fraud or mistake....

California Code of Civil Procedure §340: Within one year: ... (3) An action ... for injury to or for the death of one caused by the wrongful act or neglect of another...

STATEMENT OF THE CASE

This case was previously before the Court and decided in Petitioners' favor on the question whether Section 510 of ERISA prohibited discrimination to interfere with non-vested benefits provided to Petitioners under a multiemployer health and welfare plan. *Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka*, 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997).

Petitioners are former employees of Respondent SANTA FE TERMINAL SERVICES, INC. (SFTS) who were fired and rehired in a calculated plan to strip them of protected benefits. SFTS was a wholly-owned subsidiary of Respondent BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY (BNSF or BURLINGTON or RAILROAD), formerly The Atchison, Topeka & Santa Fe Railway Company (ATSF or SANTA FE or RAILROAD). Petitioners performed loading and unloading work on SANTA FE trains with RAILROAD's equipment within its Los Angeles inter-modal rail terminal. Respondent IN-TERMINAL SERVICES, INC. (ITS) took over the inter-modal work when SFTS and its employees (Petitioners) were terminated by SANTA FE, and ITS rehired Petitioners the next day with no Teamsters health, dental, or vision benefits, reduced vacation and similar benefits, and sharply reduced Teamsters pension contributions. By virtue of its "fire and rehire" decision SANTA FE (and later BURLINGTON) was relieved of the obligation to contribute to the Railroad Retirement Board payments amounting to well over $6,000 per employee every year to fund their RRB benefits. As a result many among Petitioners lost all eligibility for RRB pensions, and the rest will receive far smaller RRB pensions. In its first decision of this case in 1996, see 80 F.3d 348, 351-2, the court of appeals held that the lost RRB benefits were outside the scope of ERISA's coverage as a "governmental plan." Petitioners' point on this subject in their 1996 Petition (No. 96-491) was not accepted for review by the Court's Order of November 27, 1996 which granted certiorari on the point mentioned above.

A.
PROCEDURAL HISTORY

Petitioners filed their Complaint on July 17, 1992 less than three years after their unlawful discharge and less than one

year after retaining counsel (E. 275, 433).[1] In Count I they alleged violations of ERISA Section 510 and their contractual right to receive benefits promised by the National Master Freight Agreement (NMFA) and Western States Area Supplemental Agreements (WSASA) between the Teamsters Union and a multitude of employers within the freight industry including SFTS. Count II of the Complaint (injuries under the FELA) is not a subject of this Petition.

At the time of Petitioners' first filing (July 1992 - two years, three and one-half months after the "fire and rehire" violation) the statute of limitations governing an ERISA Section 510 claim arising in California had yet to be decided. Petitioners operated on the premise either that California's three-year limits for statutory actions or fraud actions, California Code of Civil Procedure §338(a) and (d) (hereinafter "CCP") or California's four-year limit for actions upon any contract, obligation or liability founded upon a written instrument, would govern. Respondents apparently agreed because they did not plead any statute of limitations defense. ERISA Section 510 does not contain its own statute of limitation and the ERISA limitation for breaches of fiduciary duty and other violations, Section 413, is limited to actions under Part 4 of Subtitle B of Title I of the Act. Section 510 was enacted within Part 5.

On November 11, 1992 Respondents moved to dismiss the ERISA claims on the basis that Petitioners failed to state a claim for interference with any protected benefits. Respondents did not plead any contention the ERISA claims were or might be time-barred. On March 6, 1993 the district court dismissed the case and Petitioners filed their first appeal (E. 437).

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[1] All citations to the Excerpts of Record before the court of appeals are given as "E."

On September 17, 1993 the Ninth Circuit ruled for the first time that in some (but no means all) Section 510 claims filed in California, the federal courts would import that state's one-year statute of limitation for implied contracts, CCP §340,[2] although in some cases they would import its two-year statute (oral contracts) CCP §339 or its four-year statute (written instrument) CCP §337.[3]

On March 2, 1994 in a letter to the Ninth Circuit, Respondents **first** claimed that these Section 510 claims were barred by a statute of limitation (E. 388). Respondents admitted they had not raised in the district court before appeal any statute of limitations issue (E. 388). In its first decision in this matter, rendered on March 27, 1996 the Ninth Circuit declined to consider the statute of limitations issue as to a Section 510 claim because it had been raised for the first time only on appeal. *Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka*, 80 F.3d 348, 350 n.4 (1996).

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[2] *Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir.), *cert. denied*, 511 U.S. 1083, 114 S.Ct. 1833, 128 L.Ed.2d 412 (1994). The *Hinton* Court held that, where a Section 510 claim filed in California is based on violation of a written agreement, California's four-year period of limitation applied. *Id.* at 394.

[3] When Petitioners filed this case in 1992 California courts had yet to decide "whether the statute of limitations governing a tortious wrongful discharge action was one year (CCP §340) or four years (CCP §343)." *Turner v. Anheuser-Busch, Inc.*, 20 Cal.App.4th 1183, n.1 (1992), *on review*, 7 Cal.4th 1238 (1994). Not until 1996 did California courts finally declare that a one-year statute of limitations applied to a state commonlaw wrongful discharge claim. *Barton v. New United Motor Mfg.*, 43 Cal.App.4th 1200 (1996). Barton noted that up till 1996 "some uncertainty exist[ed] as to what statute of limitations governs a wrongful termination claim." *Id.* at 1205. The *Barton* court pointed out that the California Supreme Court had yet to rule on that issue. *Id.* at n.2. To this date, it still has not.

After that decision Petitioners sought certiorari in the Supreme Court on three questions, including whether they had stated a claim under Section 510 for Respondents' interference with their non-pension benefits governed by the written collective bargaining agreements (CBA). The Court granted certiorari on that issue only on November 27, 1996. Its unanimous opinion on May 12, 1997 upheld the Section 510 cause of action, vacated the court of appeals' opinion, and remanded. 520 U.S. 510 (1997). The Court did not address the statute of limitations issue.

Respondents **first moved** after remand from this Court to dismiss the ERISA Seetion 510 claims as time-barred on November 21, 1997 (E. 445-46). Petitioners responded that the district court should not retroactively apply the Ninth Circuit's 1993 *Hinton* ruling. The district court granted Respondents' motion, but followed the holding of the *Hinton* court to give Petitioners leave to amend their Complaint "to establish that the employment contract was written rather than oral" and thus fall under California's four-year limitations for actions founded on a written instrument (E. 36). Petitioners filed their Second Amended Complaint pleading that their ERISA claims were based on specific obligations founded on the written CBAs (E. 6-28).

Respondents then moved for a second time after remand to dismiss the ERISA claims on the basis of the one-year personal injury statute. On April 16, 1998 the district court adjudicated the merits of that motion by denying it. The district court also reaffirmed its earlier ruling that California's four-year statute for written instruments governed the ERISA claims under the analysis of *Hinton* (E. 101). In its March 16, 1998 "tentative ruling," later adopted by the district court, the district court ruled that Petitioners' Section 510 claim "falls under the

ambit of California's four-year statute of limitations for written contract cases" (E. 90).

Respondents later in 1998 moved for summary judgment against the ERISA claims on numerous grounds including the time bar of the California personal injury limitation. On December 18, 1998 the district court granted summary judgment, finding the ERISA claims were not founded on the written CBA agreements but were governed by the one-year statute (E. 398). Petitioners promptly moved for reconsideration and heavily argued waiver or equitable estoppel, but the district court stood by its summary judgment on January 22, 1999 (E. 418).

B.

STATEMENT OF FACTS

The facts pertinent to Respondents' statute of limitations defense are undisputed. Petitioners were employed by SFTS within the RAILROAD's yard owned and operated by BURLINGTON's predecessor, but received their paychecks from SANTA FE and enjoyed "Railroad" employee status with FELA coverage and RRB benefits. Petitioners were employed under written CBAs which governed every aspect of the terms, conditions and benefits of their employment (E. 278-374). Those CBAs would not expire until at the earliest one year after the wrongful "fire and hire" discharge (E. 278, 336), and in the interim could only be changed through bargaining at the level of the multiemployer bargaining. Petitioners alleged that there had long existed a normal practice and custom of SFTS routinely extending the CBAs with the Teamsters Union for additional multi-year periods (E. 15-6).

The Teamsters' National Master Freight Agreement (NMFA) covered any change of operations by Appellants' employer (or any other signatory employer), all subcontracting of work covered by the agreement, cancellation of the agreement, transfers of employees, and discharge of employees (E.294, 301-03, 321-22, 331-2). The NMFA also proscribed "any ... discriminatory acts prohibited by law" (E. 332).

The Western States Supplemental CBA (WSASA) required Appellants' employer to contribute $322.84 per month per employee to the Teamsters Health and Welfare benefit fund, and defined employee eligibility for health and welfare benefits (E. 352). As of April 1, 1988, the WSASA required employers to contribute $1.83 per employee per hour worked to the Teamsters Pension Trust Fund (E. 354). Pursuant to the contract (E. 354), that pension contribution level to be increased to $1.93 per employee per hour worked on April 1, 1990, the day after Petitioners' mass discharge (E. 392-93). The WSASA covered "disputes" over pension contributions (E. 354). The WSASA also set out the criteria for generous ERISA-protected paid holidays and paid vacations and personal days (E. 349, 351).

On March 31, 1990 Petitioners were discharged from their employment with ATSF and SFTS (E. 375). They alleged a conspiracy to discharge them and thus to interfere with their contractually-based employment for the purpose of stripping away or reducing their contractually-set benefits (E. 22). This discharge violated their rights under ERISA Section 510 to be free of adverse employment actions which interfered with or discriminated against or retaliated against their exercise of their protected employment benefits (E. 22-3). On April 1, 1990 ITS rehired Petitioners to perform the same work that they had done for the RAILROAD in the same railyard and with the same ATSF equipment. Every aspect of

Petitioners' re-employment with ITS at the ATSF railyard in March and April 1990, including the health and welfare and pension contributions and the previously generous vacation pay provisions now lost was precisely governed by a written contract of employment (E. 376). ITS reduced the amount of pension contributions and suspended their health, dental and vision insurance and reduced other welfare benefits that the Petitioners were to have received under the unexpired contracts between SFTS and the Teamsters Union.

Those reductions of ERISA-covered benefits were set out in a new ITS-Teamster contract dated April 1, 1990 (E. 376). The ITS contract provided no health and welfare contributions by ITS (and no health, dental or vision coverage for these employees) for the period April 1 through September 30, 1990. After October 1 the successor employer would begin a vastly scaled back health and welfare contribution, but that would support only limited health insurance without many of the benefits before provided (E. 381, 392-3). The ITS contract rolled back the pension contribution from the contractual increase scheduled to go into effect the day after discharge (E. 383). The ITS contract on its face reduced vacation pay for "SFTSI employees who, as of the date of execution of this Agreement, were entitled to" five weeks paid vacation to three weeks and for "SFTSI employees, who as of the date of execution of this Agreement, were entitled to" four weeks of paid vacation to two weeks (E. 381). But no employee received the expected vacation pay from ITS throughout the remaining nine months of 1990 (E. 255-56).

Petitioners after a diligent, lengthy search and organization for fund-raising retained the undersigned counsel only on December 11, 1991 to represent them in their claims against Respondents (E. 275). None of Petitioners is an attorney. Rather, all were working members of the Teamsters

Union unfamiliar with the intricacies of ERISA or the California law of limitation of actions (E. 275). Their complaint was filed on July 17, 1992 (E. 433).

Federal court jurisdiction was founded on 28 U.S.C. §1331 pursuant to ERISA Section 502(e), 29 U.S.C. §1132(e). Under 28 U.S.C. §1291, the Ninth Circuit had appellate jurisdiction over the district court's order granting summary judgment on the ground of statute of limitations.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS INCORRECTLY CHOSE TO APPLY A CALIFORNIA ONE-YEAR STATUTE OF LIMITATIONS TO PETITIONERS' SECTION 510 CLAIM ALTHOUGH IT HAD PREVIOUSLY RECOGNIZED THAT SUCH A SHORT PERIOD FRUSTRATED CONGRESS' BROAD REMEDIAL INTENT IN ERISA

When a federal statute does not provide its own limitations period a court generally applies the "state statute 'most closely analogous' to the federal Act in need." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995). In doing so the analogizing court has a "duty," *Reed v. United Transp. Union*, 488 U.S. 319, 324, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989), to prevent the importation of state limitation periods which undermine ERISA's national policies.

To this end a court will apply a federal statute of limitations "when the state limitations periods with any claim of relevance would 'frustrate or interfere with the implementation of national policies,' or be 'at odds with the purpose or operation of federal substantive law.'" *North Star Steel Co. v. Thomas*, 515 U.S. at 34. The federal limitations must come from an "analogous federal law, more in harmony with the objectives of the immediate cause of action." *Id.*

In *North Star Steel*, a claim under the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101 *et seq.*, for the employer's failure to give the required notice of closure of one plant, this Court applied a longer limitation under Pennsylvania law rather than the six-month statute for unfair labor practice claims under the National Labor Relations Act (NLRA), 29 U.S.C. §160(b). Because it was unnecessary to choose any one analogy, the Court held that either Pennsylvania's two-year statute for enforcing civil penalties, its three-year statute for wage claims, its four-year statute for breach of implied contracts, or its six-year residual statute of limitations would be proper and would not frustrate federal policy under WARN. 515 U.S. at 35-6.

Here, the Ninth Circuit ruled that the California claim most analogous to Petitioners' ERISA Section 510 claims was a new, long post-filing one for wrongful discharge under commonlaw. This ruling purported to follow but effectively repudiated its prior decision(s) in *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (9th Cir. 1990)[4] and *Hinton v. Pacific*

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[4] *Felton* arose in Arizona. The employer argued that since Section 510 of ERISA is a statutory action the Ninth Circuit should apply Arizona's one-year limitations for statutory claims. The Ninth Circuit rejected that argument and held that the Section 510 claim was most analogous to a state law wrongful termination suit. 940 F.2d at 512. The court of appeals found, in the absence of a state court decision, that

Enterprises, 5 F.3d 391. The Ninth Circuit in this case relied upon a 1996 decision in which a California court first held that its one-year general personal injury statute of limitations applied to common-law wrongful discharge claims. *See Barton*, 43 Cal.App.4th at 1209. The Ninth Circuit thus held in 1999 that Petitioners' Section 510 claims were time-barred when filed in 1992 by virtue of a 1996 state court decision interpreting state commonlaw. That ruling did violence to the Congressional purpose and the national policy that ERISA has broad remedial purposes. It also conflicted with other circuit courts of appeal.

A.

THE ONE-YEAR STATUTE OF LIMITATIONS DEFEATS ERISA'S REMEDIAL PURPOSES

The Ninth Circuit's application of California's one-year personal injury statute to Petitioners' Section 510 claims severely frustrates and defeats Congress' broad remedial purpose behind ERISA. In looking at the Arizona statutes of

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Arizona's two-year limitations for personal injury actions would apply to wrongful termination suits. *Id.* The *Felton* court held that applying **a one-year** limitation to a Section 510 claim "'would interfere with the strong federal policy that underlies ERISA.' This is particularly true in light of the three- and six-year limitations periods provided in other parts of ERISA. 29 U.S.C. §§1113, 1451." *Id.* at 513 (emphasis supplied). *Felton* cited the "duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies" imposed by the Court in *Reed v. United Transp. Union*, 488 U.S. 319, 324, 109 S.Ct. 621, 625, 102 L.Ed.2d 665. Petitioners submit that this previously sound reasoning of the Ninth Circuit should guide the Court in choosing a federal three-year limitation period for all Section 510 claims, no matter in which states they might arise.

limitations in *Felton*, 940 F.2d at 513, the court of appeals earlier had found this to be true. The Court as a practical matter is effectively compelled to grant certiorari and reverse the Ninth Circuit's adoption of a one-year limitation.

In Section 2(b) of ERISA Congress declared that "[i]t is ... the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1001(b).

This Court recognized, in *Varity Corp. v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), that Congress intended ERISA to "'provide both the Secretary and participants and beneficiaries with *broad remedies* for redressing or preventing violations of [ERISA].'" *Id.* at 512 (emphasis added). The Court found that the remedial statute in ERISA, Section 502, 29 U.S.C. §1132, provided "'catchall' provisions [which] act as a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." *Id.* Justice Breyer, writing for the majority, posed a series of magisterial questions focusing on why and how the Court could never find, in light of the legislative history and the language of the statute, that Congress intended to deny to employees a remedy for employers' actions that wrongfully deprive them of benefits or to restrict their access to justice. *Id.* at 511-12. The Court found that no denial of ERISA's remedies was among the Congressional purposes underlying its enactment. "We are not aware of any ERISA-related purpose that denial of a remedy would serve." *Id.* at 515. What the court of appeals consciously did here, however, was to deny Petitioners a

remedy based on an improperly analogized state decision rendered four years after the filing of their Complaint and adopted six years after.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the Court described ERISA as "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." In *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 137, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), the Court noted that ERISA "'sets various **uniform standards,** including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans.' As part of this **closely integrated regulatory system** Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.' **Prominent among these safeguards** are three provisions of particular relevance to this case: ... §510, which proscribes interference with rights protected by ERISA" (emphasis added, citations omitted). The Court in *Ingersoll-Rand* went on to note the importance to Congress of Section 510: "Congress viewed this section as a **crucial** part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Id.* at 143 (emphasis added, citations omitted).

It hardly serves Congress' purpose and design to adopt a one-year statute of limitation for this important provision of ERISA. No tenable ground exists to hold that Congress intended to deny access to justice by such a short statute of limitations. Petitioners argued below to no avail that a one-year statute interfered with Congress' remedial purpose behind ERISA.

B.

THE WIDESPREAD CONFLICTS BETWEEN THE CIRCUIT COURTS OF APPEAL ARGUE FOR GRANTING CERTIORARI AND THE ADOPTION OF A UNIFORM STANDARD FOR DETERMINATION OF THE STATUTE OF LIMITATION

The circuit courts of appeals differ widely among each other and within themselves on what state statutes of limitation should be analogized to ERISA Section 510 actions.[5] Their record reveals that they find no ready analogies to Section 510, and that their difficulty in analogizing leads to an unpredictable, chaotic patchwork of limitations which often works at cross purposes to the national policy.

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[5] In considering Arizona law on this question first, the Ninth Circuit analogized to what it thought would be a **two-year** statute of limitation for a wrongful termination suit in *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991). When the Ninth Circuit first turned to California law in 1993 it turned to contractual limitations and analogized to either a **one-year** statute of limitation (CCP §340), a **two-year** period (CCP §339), or a **four-year** statute for cases where employment was under a written contract (CCP §337). *Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir.), *cert. denied*, 511 U.S. 1083, 114 S.Ct. 1833, 128 L.Ed.2d 412 (1994). Not until its *Burrey v. Pac. Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998) decision, a few months before the summary judgment against Petitioners, did the Ninth Circuit opt for a **one-year** limit. The one-year limit of *Burrey* is derived from a 1996 California appellate decision which fixed the time applicable *only* to commonlaw wrongful discharge actions. Its focus was on the "personal" nature of the rights invaded, not on any national policy. *See Barton v. New United Motor Mfg.*, 43 Cal.App.4th 1200. The issue of the limitation period for commonlaw actions has yet to be resolved by the California Supreme Court.

In contrast to the Ninth Circuit's recent utilization of California's new commonlaw discharge limitation, the Eleventh Circuit applies either a state's limitation for wage claims or its limitation for statutory actions, but with wildly inconsistent results.[6] The Fifth and Seventh Circuits apply wrongful discharge statutes of limitations to Section 510 claims, although the length of that period varies greatly by state.[7] The Second Circuit adopted New York's two-year limitation applicable to termination in retaliation against receiving workers' compensation benefits. But the Tenth Circuit adopted an entirely different analogy to New York law,[8] and found that

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[6] *See Musick v. Goodyear Tire & Rubber Co., Inc.*, 81 F.3d 136, 139 (11th Cir. 1996), *cert. denied*, 519 U.S. 965, 117 S.Ct. 389, 136 L.Ed.2d 305 (1997) (Alabama's **two-year** wage claim limitations or Alabama's **two-year** retaliatory discharge limitation) and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989) (applying either Georgia's **two-year** wage claim limitations **or its 20-year** statutory claim limitations). *But see Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992) (Florida's **four-year** limitations for suits founded upon statutory liability applied instead of its two-year wage claim limitations).

[7] *See Teumer v. General Motors Corp.*, 34 F.3d 542, 549 (7th Cir. 1994) (Illinois' **five-year** limitation for retaliatory discharge); *Ahnert v. Delco Electronics Corp.*, 982 F.Supp. 1320, 1323 (S.D. Ind. 1997) (Indiana's **two-year** limitation for retaliatory discharge); *McClure v. Zoecom, Inc.*, 936 F.2d 777, 778 (5th Cir. 1991) (Texas' **two-year** wrongful discharge and employment discrimination limitation); *Banks v. Jockey Int'l*, 996 F.Supp. 576, 579 (N.D. Miss. 1998) (Mississippi's **three-year** "catch-all" statute of limitations for wrongful termination); and *Franz v. Iolab, Inc., Div. or Subsidiary of Johnson & Johnson, Inc.*, 801 F.Supp. 1537, 1544 (E.D. La. 1992) (Louisiana's **one-year** limitation for wrongful discharge).

[8] *See Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 337 (2nd Cir. 1997). By contrast, the Tenth Circuit, interpreting New York law, held that New York's **six-year** limitation period for breach of contract actions applied to a Section 510 claim for recovery of pension benefits or for damages, while a **three-year** limitation applied to a Section 510 claim for injunctive relief on an analogy to employment discrimination. *Held v.*

New York provided a six-year period. The opinion of the Second Circuit is especially instructive in depicting that court's agony over the complexity of the choices. The Eighth Circuit has applied the arising state's six-year breach of contract limitation period.[9] But this test can produce a wide variety of results within the same circuit.[10] The Third Circuit has analogized a claim under Section 510 to a claim of employment

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Manufacturer's Hanover Leasing Corp., 912 F.2d 1197, 1207 (10th Cir. 1990).

[9] *See Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir.), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991). If the Ninth Circuit had applied this test here, Petitioners would have enjoyed a four-year limitation period under California's statute for obligations founded on a written instrument. CCP §337. This was good law in the Ninth Circuit until 1998. *Hinton v. Pacific Enterprises*, 5 F.3d 391, 394.

[10] *Larson v. University Women's Health Pension Plan*, 971 F.Supp. 398, 400 (D. Minn. 1997) (Minnesota's **two-year** limitations for wage claims applied to a Section 510 claim). Ark. Stat. Ann. §16-56-105 (1999) (Arkansas' **three-year** limitations on actions on contract). Iowa Code §614.1 (1999) (Iowa's **five-year** limitations on actions on unwritten contracts, **ten-year** limitations on actions on written contracts, and **two-year** limitations on wage claims). R.R.S. Neb. §25-205 (2000) (Nebraska's **five-year** limitation on actions on written contracts). R.R.S. Neb. §25-206 (2000) (Nebraska's **four-year** limitation on actions on oral contracts or statutory liability). N.D. Cent. Code §28-01-16 (2000) (North Dakota's **six-year** limitation on actions on contracts). S.D. Codified Laws §15-2-13 (2000) (South Dakota's **six-year** limitation on actions on contracts). S.D. Codified Laws §15-2-15(3)(4) (South Dakota's **two-year** limitation on actions for wages). §516.120 R.S.Mo. (1999) (Missouri's **five-year** limitations on actions on contract). *See*, however, Section 516.110(1), Missouri's **ten-year** limitation on actions on written contracts to pay money. Held applicable to actions for breach of a written employment contract. *Hughes Development Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. 1997).

discrimination or breach of fiduciary duty.[11] Other circuit courts of appeals, as best we can determine, have not decided this issue, although their district courts have reached widely varying decisions both as to statutes they analogize to Section 510 actions and as to periods of time.[12]

Because twenty-eight years after passage of ERISA the lower courts are still struggling with this issue, and because the circuit courts of appeal reach widely divergent results in their searches for analogous state statutes – not only among themselves but even as to the various states within their respective ambits – a chaotic situation has emerged which may become even worse. This situation cries out for clarity and certainty before it becomes bedlam. The Court should grant certiorari to clarify the proper statute of limitations applicable to Section 510 claims, or at the least to refine its guidance to the lower courts for their analogizing.

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[11] *Gavalik v. Continental Can Co.*, 812 F.2d 834, 843 (3rd Cir. 1987) (applying **six-year** limitations applicable at that time to cases of employment discrimination or breach of fiduciary duty). *But see, Anderson v. Conrail*, 1999 U.S. Dist. LEXIS 4787, 14-15 (E.D. Pa. Apr. 7, 1999) (applying Pennsylvania Superior Court decision post-*Gavalik* that wrongful discharge was an action in tort with a **two-year** limitation. *Raleigh v. Westinghouse Elec. Corp.*, 379 Pa. Super. 606, 550 A.2d 1013, 1014 (Pa. Super. 1988), *appeal denied*, 563 A.2d 499 (Pa. 1989). Analogy to Delaware's "catch-all" statute has led to a **three-year** limitation. *DeWitt v. Penn-Del Directory Corp.*, 872 F. Supp. 126, 134 (D. Del. 1994).

[12] *See Giuffre v. Delta Air Lines, Inc.*, 746 F.Supp. 238, 241 (D. Mass. 1990) (Massachusetts **three-year** tort statute); *Price v. United Parcel Service, Inc.*, 601 F.Supp. 20, 23 n.1 (D. Mass. 1984) (Massachusetts **six-year** limitation applied under analogy to breach of contract claims alleging bad faith); and *Sutter v. First Union Nat. Bank of Va., Inc.*, 932 F.Supp. 753, 757 (E.D. Va. 1996) (Virginia's **one-year** "catch-all" statute covering wrongful discharge claims applied).

The injustice to these Petitioners is the product of the Ninth Circuit's inability to follow its own earlier decisions[13] which drew their inspiration from the "duty" this Court imposed in *Reed v. United Transp. Union*, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) and its predecessors to analogize to state limitation statutes so as to promote the national policy and to effectuate the Congressional intent. The Ninth Circuit's evident desire for clarity, simplicity and predictability has led it to ignore the "duty" imposed by this Court in *Reed*, to avoid the importation of unsuitable state laws, and has caused it to abandon its previous holdings in *Felton v. Unisource Corp.*, *supra*, and *Hinton v. Pacific Enterprises, supra*, which gave some consideration to a role in the exposition of national policy.

Petitioners contend that the need for clarity, simplicity and predictability is evident. They further contend that the need for uniformity has become clear after this long-running welter of confusion. Under the present state of the jurisprudence the situation is poised to become a national nightmare. This potential is highlighted by the conflict mentioned above between the Second and Tenth Circuits about which New York state statute to analogize to and the divergences among the states within the Eleventh Circuit discussed above at n 6. Meanwhile, if this Court does not impose some national authority in our largest state, these complex suits so important to "make promises credible" in the words of Justice O'Connor speaking for the *Inter-Modal* Court, 520 U.S. 515, will continue to be analogized to personal injury and commonlaw discharge actions and barred if not filed within one year.

Giving victimized employees such as Petitioners only one year to find and retain counsel suitable for a Section 510

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[13] *See* footnote 4 *supra*.

action, and for that counsel to conduct an adequate prefiling inquiry, will inevitably deny access to justice to many if not most of them. The undermining of the Congressional intent and the national policy embodied in ERISA is apparent.

ERISA applies to all qualified plans from coast to coast uniformly in all respects except the key component of enforcement. Three-year limitation periods abound in other ERISA enforcement actions which cover virtually all other beneficiaries' rights created by the Act. In actions under Sections 413 or 4301(f) there is no need to analogize, and counsel need not guess about when they must file. Both are sufficiently long enough to permit unsophisticated clients to locate and make arrangements to retain counsel and for the trial bar time to properly meet its need for adequate prefiling inquiry and to acquire technical mastery of what still remains new material for many. The obvious difficulties of analogization have shown why the only suitable analogy must be to a federal statute readily determined by all and consistent with the Congressional purpose in enacting ERISA.

C.

THE NINTH CIRCUIT FAILED TO IMPORT FOR PETITIONERS' CLAIMS CALIFORNIA'S THREE-YEAR LIMITATION FOR STATUTORY WRONGFUL DISCHARGE ACTIONS

Petitioners argued below that California's three-year limitation for statutory wrongful discharge claims was most closely analogous and should apply to their Section 510 claims.

Following a recent Ninth Circuit decision,[14] the court of appeals rejected this argument and applied in overbroad fashion the 1996 intermediate appellate decision in *Barton v. New Motor Mfg.*, 43 Cal.App.4th 1200, 1209, holding that California's one-year personal injury limitation applied to commonlaw wrongful discharge claims.

This Court has instructed the lower courts that when choosing the proper state limitations to apply to a federal claim, courts should "'borrow' the **most suitable** statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the **most closely analogous** statute of limitations under state law." *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 146, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (emphasis added). This suggestion was originally followed by the Ninth Circuit in *Felton* (1991) and *Hinton* (1993) but disregarded here and in its *Burrey* (1998) decision.

Petitioners submit that California's most analogous action to Section 510 of ERISA is that for statutory wrongful discharge. In such claims, California holds that the three-year limitation in CCP §338(a) applies. *See Lerner v. Los Angeles City Bd. of Ed.*, 59 Cal.2d 382, 389 (1963) and *Peles v. LaBounty*, 90 Cal.App.3d 431, 435 (1979). Indeed, the *Barton* decision relied upon by the Ninth Circuit here noted that the three-year limitation in CCP §338(a) could apply to a wrongful discharge claim "where the liability is embodied in a statutory provision and is of a type that did not exist at common law." 43 Cal.App.4th at 1209 n.6. The Section 510 claim for interference with statutorily protected rights appears not to have

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[14] *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998), appears to now be accepted by the Ninth Circuit as mandating a one-year limitation in every Section 510 case arising in California.

existed at commonlaw, but was a creation of Congress. Analogizing it to a commonlaw action when an appropriate analogy was at hand which carried a limitation period identical to that provided elsewhere in ERISA was patently wrongheaded, and perhaps best understood as a reflection of the Ninth Circuit's frustration with the analogy process and its appreciation of the need for certainty.

D.

THE THREE YEAR LIMITATIONS UNDER SECTIONS 413(a) AND 4301(f) OF ERISA SHOULD APPLY TO CLAIMS UNDER ERISA SECTION 510

Instead of leaving the statute of limitations governing Section 510 claims to the chance of analogies from where the claim arose, or even in what circuit or district the case is litigated, Petitioners urge that the Court accept this case (once again), this time as the vehicle to adopt a uniform federal three-year limitation. The source of this uniform limitation is either of two other sections of ERISA, Section 413(a), 29 U.S.C. §1113(a)(2) which governs fiduciary breaches and other violations of Part 4 of Subtitle B of Title I of the Act, or Section 4301, 29 U.S.C. §1451(f), governing suits on multiemployer plans. A single federal limitation of three years will achieve Congress' main purposes behind ERISA – uniform regulation and the protection of the right to employment benefits – by providing a reasonable, fixed and widely recognized period of time to seek federal remedies.[15]

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[15] ERISA claims for breach of fiduciary duty may be quite similar to Petitioners' Section 510 claims, *see Varity*, 516 U.S. 489.

As ERISA "is a 'comprehensive and reticulated statute,' and is 'enormously complex and detailed,' it should not be supplemented..." with state law doctrines, *Hughes Aircraft Co. v. Jacobson*, 119 S.Ct. 755, 764, 142 L.Ed.2d 28 (1999), such as very short state statutes of limitation which provide no uniform means of regulating conduct. Hence, rather than attempting to refine the process of analogy to find a state statute of limitations to import, which still will produce differing results according to the chosen jurisdiction, the Court should adopt a uniform federal limitation period. This is especially so in light of "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute,'" behind which lies the "purpose to protect contractually defined benefits." *Massachusetts Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 146-8, 105 S.Ct. 3085, 87 L.Ed.2d 961 (1985).

There can be little doubt that the provisions governing multiemployer plans, such as the plans involved in this case, in Title IV of ERISA, are interlocked with the provisions of Title I, protecting employee benefit rights. *See, for example, Curtiss-Wright Corp. v. Schoonegongen*, 514 U.S. 73, 80, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995) (noting that the plan amendment provisions in Section 402 of ERISA apply to multiemployer plans) and *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988) (discussing the interplay between Sections 502, 515 and 4212 of ERISA). The three-year limitation in ERISA Section 4301(f) provides a close analogy to Petitioners' claim against their former employer, its parent and their successor employer for interference with protected rights under these multiemployer plans. *See Bay Area Laundry v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (determining when Section 4301(f)'s limitations began to run).

Applying a uniform limitation defined by a related provision in ERISA provides a significantly more appropriate vehicle for the interstitial lawmaking required to effectuate ERISA. Moreover, because this Section 510 claim at its core focuses on interference with Petitioners' rights under multiemployer pension and health and welfare plans covering operations by employers throughout the Western United States, adopting a uniform federal limitation would more closely fulfill one of Congress' chief concerns in enacting ERISA – achieving uniform regulation of plans covering interstate commerce. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987).

For those reasons, both Sections 413's and 4301(f)'s three-year limitations are more appropriate to this Section 510 claim than a state statute of limitations applicable to personal injury and commonlaw discharge claims. *See North Star Steel*, 515 U.S. at 35, and *Reed v. United Transp. Union*, 488 U.S. at 324.

II.

RESPONDENTS WAIVED THE STATUTE OF LIMITATIONS DEFENSE BY NOT TIMELY RAISING IT

The court of appeals applied to Petitioners the full harshness of its then newly-imported California law limitation without affording them the clear benefits of the corresponding state law on waiver and equitable estoppel. Respondents did not raise their statute of limitations defense in the district court to these 1992 filed claims until after remand from this Court and the court of appeals in 1997. Simply put, neither California law nor the Ninth Circuit's interpretations of ERISA provided the slightest support for such a defense until 1993 or 1994 at

the earliest. Respondents attempted in 1994 to raise this defense on the first appeal, but only after the Ninth Circuit had first suggested that California's one-year or two-year limitations might sometimes apply to Section 510 claims.[16] The court of appeals in 1996 "decline[d] to consider the issue" because it had not been raised below. *Inter-Modal*, 80 F.3d at 350 n.4. But on this second appeal the court of appeals rejected Petitioners' argument that Respondents had waived any limitations defense by failing timely to raise it. It cited only to Rule 12(b)(6), Fed. R. Civ. P. (App. 5a-6a), and likewise swept aside Petitioners' equitable tolling arguments (App. 6a).

The court of appeals holding on the waiver issue appears to conflict with the ruling in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), as does its rejection of equitable tolling. In *Zipes* the district court had approved a settlement of a class action claiming Title VII violations, *id.* at 388, but the court of appeals reversed the settlement because the class representatives were inadequate. *Id.* On remand, for the first time, the employer argued that the claims were time-barred because they had not filed EEOC claims within Title VII's 90-day limitation. *Id.* This Court reversed the ruling that the claims were time-barred on the ground the employer there had not raised the limitations defense until after remand to the district court following the first appeal. The Court in *Zipes* explained its decision:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement **subject to waiver** as well as tolling when equity so requires, we **honor the remedial purpose of the legislation** as a whole without the negating

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[16] *Hinton v. Pacific Enterprises*, 5 F.3d 391.

> the particular purpose of the filing requirement, to give prompt notice to the employer.

Id. at 398 (emphasis added). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 332-3, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (waiver of limitations defense by failing to timely raise it until after trial) and *Bardon v. Land & River Imp. Co.*, 157 U.S. 327, 331, 15 S.Ct. 650, 39 L.Ed. 719 (1895) ("alleged limitation was not set up in the answer or the question raised in any way ... in the circuit court, and, if so, comes too late").

The Ninth Circuit's decision not to hold the limitations issue waived by timely failure to plead also conflicts with the Third Circuit's holding in *Van Sant v. American Express Co.*, 169 F.2d 355, 372 (1948), which held that a limitations defense cannot be raised for the first time after appeal and remand.[17] Other Circuits hold that a limitations defense may be waived if it is not "timely" raised, *Banks v. Chesapeake & Pot. Tel. Co.*, 802 F.2d 1416, 1427 (D.C. Cir. 1986), where it is not presented at the "earliest possible moment," *Davis v. Bryan*, 810 F.2d 42, 44 (2nd Cir. 1987), or where it is pleaded only some 30 months after filing and following reliance by plaintiff, *Hayden v. Ford Motor Co.*, 497 F.2d 1292, 1294 (6th Cir. 1974).

Indeed, the California courts hold that failure to raise a statute of limitations defense promptly constitutes a waiver of that defense. *Getz v. Wallace*, 236 Cal.App.3d 212, 213 (1965). In a federal law claim where a state limitations period is

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[17] In *Alexander v. Alexander*, 140 F.R.D. 925, 930 (W.D. S.C. 1956), the court interpreted *Van Sant* as holding "that after remand a plea of the statute of limitations, which had not been plead prior thereto, was waived and defendant's motion so to amend his answer was properly denied."

borrowed, it is axiomatic that the federal courts also apply that state's law on tolling and its waiver rules. *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). Here, of course, the Ninth Circuit gave Petitioners the harshness of an improperly borrowed California statute of limitation without allowing them the benefits of the clearly applicable California waiver and equitable tolling. Either doctrine would plainly have saved Petitioners' case.

Under this Court's precedents, by filing their motion to dismiss on the merits in 1993 without any mention of a statutory time bar, Respondents judicially admitted they had sufficient notice of Petitioners' claims to defend against same. Where the "purposes and policies" underlying a statute are "humane and remedial," such as in ERISA, courts narrow the application of time limitations, especially when a plaintiff has put a defendant on notice of claims with sufficient time to defend. *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 427-8, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). Indeed, although statutes of limitations evince an interest in "prompt resolution of disputes," that interest "always must be balanced against the countervailing interest in allowing valid claims to be determined on their merits." *Hardin*, 490 U.S. at 542 n.10. Applying the proper balance to these Section 510 claims, in light of Congress' broad remedial purpose behind ERISA, it is clear that Respondents had sufficient notice of these claims. That is all any statute of limitation requires. *Burnett*, 380 U.S. at 427-8. The Ninth Circuit's refusal to apply waiver or equitable estoppel was a failure to follow precedents of the Court.

CONCLUSION

The Court should grant certiorari to correct the injustices presented by this case and to review the Ninth

Circuit's shift away from concern for implementation of a national policy toward elevation of California policy. Petitioners believe the latter is a fair characterization of the court of appeals' insistence on importing into Section 510 a one-year rule for commonlaw wrongful discharge while refusing to import a plainly analogous three-year statute for statutory actions and to apply the California rules on waiver and equitable estoppel. The decision below is emblematic of the uncertainty and inconsistent results which have grown progressively worse over the 28 years since ERISA's passage. If the lower courts are to be required to continue their tortuous searches for analogous statutes of limitation, they must have clear guidance in that process. Less chaotic would be the adoption of a uniform national three-year statute of limitation analogized from ERISA Sections 413(a) and 4301.

Respectfully submitted,

RICHARD E. SCHWARTZ
Counsel of Record
JAMES E. PARROT
MIDWEST CENTER FOR
LAW & JUSTICE, LLC
393 N. Euclid Ave., Ste. 300
St. Louis, MO 63108
(314) 454-0022

THOMAS V. GIRARDI
JAMES B. KROPFF
GIRARDI & KEESE
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 489-5330

APPENDIX

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APPENDIX I — UNPUBLISHED MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JANUARY 21, 2000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-55207

D.C. No. CV-92-6623 WJR

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, a non-profit, mutual benefit California Corp.; THOMAS FRANKS, in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; CHARLES JONES, in the alternative, being a director of said association, for himself and as representative of the affected class of persons plaintiff Association; THOMAS MARTIN, in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; HOYT JARRARD; in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; ROBERT STEIN, in the alternative, being a director of said Association, for himself and as representative of the affected class of persons who are members of the plaintiff Association; ROBERT F. JAQUEZ,

Appendix I

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware Corp. The Atchison Topeka & Santa Fe Railway Company; SANTA FE TERMINAL SERVICES, INC., a Delaware corp.; SANTA FE PACIFIC CORPORATION; IN-TERMINAL SERVICES, a Division of Mi-Jack Products, an Illinois corp.; MI-JACK PRODUCTS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding
Argued and Submitted November 3, 1999
Pasadena, California

Before: BROWNING, TASHIMA, Circuit Judges, and
KING, District Judge.*

Appendix I

MEMORANDUM**

Plaintiffs-Appellants ("Appellants")[1] brought this action against various employers ("Appellees") for interference with protected benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and for personal injury under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. The district court granted summary judgment in favor of Appellees on the ERISA claims as being barred by the statute of limitations and dismissed the FELA claims on collateral estoppel grounds.[2] Appellants timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.

Standard of Review

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[1] Inter-Modal Rail Employees Association was dismissed as a plaintiff for lack of standing.

[2] The district court initially dismissed the complaint for failure to state a claim. On appeal, we affirmed in part the dismissal of the ERISA count and reversed the dismissal of the FELA claims. See Inter-Modal Rail Employees Ass'n v. Atchison Topeka and Santa Fe Ry. Co., 80 F.3d 348 (9th Cir. 1996) ("Inter-Modal I"), *vacated and remanded*, 520 U.S. 510 (1997). The Supreme Court subsequently vacated our decision and remanded the case.

The district court's grant of summary judgment is reviewed de novo. See Robi v. Reed, 173 P.3d 736, 739 (9th Cir.), cert. denied, 120 S.Ct. 375 (1999). The district court's conclusion that a particular statute of limitation applies is a matter of law reviewed de novo. See United States v. Workinger, 90 P.3d 1409, 1412 (9th Cir. 1996). The question of the availability of collateral estoppel is also reviewed de novo. See Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997).

Discussion[3]

I. ERISA Claim

Appellants are former employees of Santa Fe Terminal Services, Inc. ("SFTS"), a wholly owned subsidiary of the Burlington Northern and Santa Fe Railway Company (one of whose predecessor railroads was formerly known as the Atchison, Topeka & Santa Fe Railway) ("Santa Fe"). They claim that Appellees violated ERISA § 510 when Santa Fe terminated its contract with SFTS, under which SFTS provided loading and unloading services at Santa Fe's intermodal railyard. SFTS consequently discharged its employees; who were then hired by the firm which was awarded the contract to succeed SFTS.

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[3] Because the facts of this complex case are known to the parties, we do not recite them here, except as necessary to aid understanding of this disposition.

Appendix I

ERISA § 510 protects an employee from being discharged to avoid payment of pension or welfare benefits.[4] ERISA does not provide a statute of limitations for an action brought under § 510. When Congress fails to supply an express statute of limitations, "courts apply the most closely analogous statute of limitations under state law," unless the state statute "frustrate[s] or significantly interfere[s] with federal policies." Reed v. United Transp. Union, 488 U.S 319, 323, 327 (1989).

In Burrey v. Pacific Gas & Elec. Co., 159 F.3d 388 (9th Cir. 1998), we adopted the reasoning of Barton v. New United Motor Mfg., Inc., 51 Cal. Rptr. 2d 328 (Ct. App. 1996), and held that the one-year statute of limitations in Cal. Civ. Proc. Code § 340(3), for a tort action for wrongful termination in violation of public policy, applied to the plaintiffs' ERISA § 510 claim. See 159 F.3d at 397. Burrey, however, was decided well after Appellants had commenced their action. Appellants thus argue that the district court erred in applying Burrey retroactively to their case.

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[4] The statute provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

29 U.S.C. §1140 (1999).

Appendix I

A. Timeliness of Defense

Appellants first contend that Appellees should be equitably estopped from raising the statute of limitations because of their failure to raise it earlier. Appellees acknowledge that they did not raise the statute of limitations in their initial motion to dismiss under Fed. R Civ. P. 12(b)(6). The Federal Rules do not require, however, that a party raise all of its affirmative defenses in a Rule 12(b)(6) motion. See Fed. R. Civ. P. 12(b). Rather, an affirmative defense, such as the statute of limitations, is timely if it is set forth in the answer to the complaint. Fed. R Civ. P. 8(c). Appellees raised the statute of limitations defense in their answer to the complaint. This assertion was timely under the rules; thus, Appellees did not waive the defense and are not estopped from raising it.

B. Retroactive Application of Burrey

Appellants contend that Burrey should not be applied retroactively to their case, relying on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Although the "usual rule is that federal cases should be decided in accordance with the law existing at the time of decision," Chevron Oil permits nonretroactive application of a judicial decision in certain circumstances. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987). Appellants' reliance on Chevron Oil, however, is misplaced.

The Supreme Court has limited the use of the Chevron Oil factors to apply a decision prospectively rather than retroactively. In Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993), the Court stated that, "a rule of federal law, once

announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." In Burrey, we applied the one-year statute of limitations to the parties before us. See Burrey, 159 F.3d at 397. Under Harper, therefore, the district court properly applied Burrey retroactively to bar Appellants' ERISA claims on statute of limitation grounds.[5]

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[5] In any event, Chevron Oil itself would foreclose Appellants' argument because there was no clearly established precedent regarding the California statute of limitations for an ERISA §510 claim on which Appellants could have relied at the time they filed their action. See Saint Francis College v. Al-Khazraii, 481 U.S. 604, 608 (1987) (noting that Chevron Oil rejected retroactive application of a one-year statute of limitations because the decision requiring the shorter limitations period "overruled clearly established Circuit precedent on which the complaining party was entitled to rely"). A year before Appellants commenced this action, Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991), noted that this circuit had not yet addressed the question of what statute of limitations applied to an ERISA §510 claim. See id. at 511. We there concluded that the state law claim most analogous to a §510 claim was wrongful termination against public policy or retaliatory discharge and held that the Arizona statute of limitations for wrongful discharge governed the action. See id. at 512. In California, the question of what statute of limitations governed an action for wrongful termination in violation of public policy was not resolved until Barton held that the one-year statute governed. See 51 Cal. Rptr. 2d at 330.

Thus, Appellants' situation is similar to Goodman where the Court affirmed the retroactive application of a statute of limitations because there was no clear precedent on which the petitioners could have relied. See Goodman, 482 U S. at 662-64 (no inequity in applying limitations period to the workers who are charged with knowledge that it was an unsettled question as to how far back from the date of filing their complaint the damages period would reach"). There was no clearly established precedent

C. Equitable Tolling

Appellants contend that the statute of limitations should be equitably tolled because, at the time they were discharged by SFTS, the uncertainty in the law prevented them from knowing what statute of limitations would apply to a § 510 claim in California. This argument fails. Not only has it been deemed equitable to apply a statute of limitations retroactively when there was no clear precedent, see, footnote 5, supra, but, "[a]s a general rule, absent some wrongdoing on the part of a defendant, a plaintiff's ignorance of his cause of action ... does not prevent the running of the limitations period." Garabedian v. Skochko, 283 Cal. Rptr. 802, 804 (Ct. App. 1991), quoted in Hinton v. Pacific Enters., 5 F.3d 391, 397 (9th Cir. 1993).

Appellants urge that the limitations period should be tolled at least until they retained counsel in December, 1991. They fail to explain, however, why they waited from March 31, 1990, the date of their discharge, until December, 1991, to retain counsel. The doctrine of equitable tolling is applied sparingly and is "not available to avoid the consequences of one's own negligence." Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998), cert. denied, 119 S.Ct. 1336 (1999). There is no explanation for Appellants' long delay in filing their complaint. Equitable tolling does not apply.

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on which Appellants would be entitled to rely in deciding when to file their action. Like the parties in Goodman, Appellants were charged with knowledge that the applicable statute of limitations "was an unsettled question."

D. Application of Different Statutes of Limitations

Appellants urge the application of various other limitations periods found in the California Civil Procedure Code. The three-year statute of limitations for an action based on fraud, Cal. Civ. Proc. Code § 338(d), does not apply because Appellants did not allege a claim for fraud, but for a violation of ERISA. The application of the three-year period for an action upon a liability created by statute, Cal. Civ. Proc. Code § 338(a), was rejected in Felton. See 940 F.2d at 512 ("The conclusion that an ERISA cause of action is most analogous to an [sic] statutory claim because ERISA is a statute reflects circular reasoning.").

The four-year statute of limitations for an action based on a written contract, Cal. Civ. Proc. Code § 337, does not apply, not only because of Burrey, but also because the essence of Appellants' claim is that they were wrongfully discharged, not that their employment contracts were breached. The analysis in Burrey focused on the "essential nature of the action," which was the violation of personal rights. 159 F.3d at 397 (quoting Burrey, 51 Cal. Rptr. 2d at 333); cf. Hinton, 5 F.3d at 394 ("The very essence of Hinton's [§ 510] claim is that she was wrongfully terminated (and thus cut off from benefits), not that the written provisions of the benefits plan were breached by [her employer]."). Thus, the fact that Appellants' employment contract was written

rather than oral does not require application of the four-year limitations period.[6]

The district court correctly gave retroactive effect to Burrey to bar Appellants' ERISA claim on statute of limitation grounds. Its grant of summary judgment in favor of Appellees on the ERISA claim is therefore affirmed.

II. FELA Claim

Under 45 U.S.C. § 51, a FELA claim can only be brought against a common carrier. A FELA plaintiff must be employed by a common carrier at the time of his or her alleged injuries. Because Appellants did not contest the fact that SFTS is not a common carrier, the dispositive issue on this claim was whether Santa Fe was Appellants' employer under the FELA.

In the related case of Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs. Inc., 826 F.Supp. 326 (C.D. Cal. 1993) (the "WARN case"), however, the district court held that SFTS and Santa Fe were not a single employer for purposes of the Worker Adjustment and Retraining

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[6] Moreover, it would make no difference whether the district court ruled, as Appellants contend that their claims are governed by the four-year statute. We are not bound by the district court's ruling. In any event, the district court merely refused to dismiss the ERISA claim under Rule 12(b)(6) because of the requirement that it accept as true the allegations of the complaint that the claim was based on a written instrument. The court denied Appellees' motion to dismiss because it had already granted Appellants leave to amend their complaint. This is not equivalent to a ruling that the four-year statute applied to their ERISA claim.

Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109. The district court therefore concluded that collateral estoppel barred Appellants' FELA claim.

Collateral estoppel "bars the relitigation of issues actually adjudicated in previous litigation between the same parties." Steen, 106 F.3d at 910 (internal quotations omitted). In order to foreclose relitigation of an issue under collateral estoppel, the moving party must establish that: (1) the issue at stake is identical to the one alleged in the prior action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a critical and necessary part of the judgment in the earlier action. See Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992). Collateral estoppel does not apply if there is any doubt as to whether an issue was actually litigated in the prior action. See Steen, 106 F.3d at 912 (quoting Eureka Fed. Sav. & Loan Ass'n v. American Cas. Co., 873 F.2d 229, 233 (9th Cir. 1989)).

Appellants did not contest that the single-employer issue was actually litigated, nor that it was necessary to the judgment in the WARN case. Therefore, the question is whether the issue at stake here is identical to that in the prior action; that is, is the finding that SFTS and Santa Fe are not a single employer for WARN purposes identical to a finding that Santa Fe is not Appellants' employer for FELA purposes.[7] We conclude that

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[7] Appellants assert that Appellees waived the collateral estoppel defense by litigating the WARN and FELA cases at the same time without objection. Appellees did not waive the collateral estoppel defense, having properly asserted it in their answer to Appellants' complaint.

the issues are not identical; therefore, collateral estoppel does not apply.

In the WARN case, the issue was whether the parent-subsidiary relationship between SFTS and Santa Fe rendered them a single employer within the meaning of WARN. See 896 F.Supp. at 333-34. By contrast, the focus in Appellants' FELA claim is whether Santa Fe was Appellants' employer at the time of Appellants' alleged injuries. The focus in the prior litigation, therefore, was on the relationship between SFTS and Santa Fe. For FELA purposes, however, the question of whether Appellants were employed by Santa Fe does not necessarily turn on the relationship between the two employers, SFTS and Santa Fe, but on the relationship between Appellants and Santa Fe.

In Kelley v. Southern Pac. Co., 419 U.S. 318 (1974), the injured petitioner was nominally employed by a trucking company, a wholly owned subsidiary of a railroad, but he alleged that he was employed by the railroad within the meaning of FELA. See id. at 319-21. The Court stated that there are three methods by which a plaintiff can establish employment with a rail carrier for FELA purposes even while nominally employed by another: (1) the employee was serving as the "borrowed servant" of the rail carrier at the time of injury; (2) the plaintiff was acting for two masters simultaneously; or (3) the plaintiff is a subservant of a company that was in turn a servant of the railroad. See id. at 324.

We consider four factors in determining whether an issue is identical to an issue previously litigated: (1) whether

there is a substantial overlap between the evidence or arguments to be advanced; (2) whether the evidence or arguments involve the application of the same rule of law; (3) whether pretrial preparation and discovery related to the matter in the first action reasonably could be expected to have embraced the matter sought to be presented in the second; and (4) whether the two claims are closely related. See Steen, 106 F.3d at 912 (quoting Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th Cir. 1995), amended on reh'g, 75 F.3d 1391 (9th Cir. 1996)).

All four factors favor Appellants. Single employer status under WARN focuses exclusively on the relationship between the parent and the subsidiary, not on the relationship between the parent and the employees of the subsidiary. In the WARN case, therefore, the court examined factors such as common ownership, common directors and/or officers, de facto control by the parent over the subsidiary, unity of personnel policies, and corporate structure. See 826 F.Supp. at 335-36. Under the first factor, then, the evidence and argument pertaining to Santa Fe's control over SFTS would not necessarily encompass evidence and arguments relating to Santa Fe's control over SFTS's employees. Similarly, regarding the third factor, the pretrial preparation and discovery in the WARN case would not necessarily have addressed the question of Santa Fe's relationship with Appellants because the WARN case focused on the relationship between the two companies.

The second factor favors Appellants because the evidence and argument do not involve the application of the same rule of law as in the WARN case. Single employer status

under WARN examines the parent company's degree of control over the subsidiary. By contrast, the focus of the inquiry for FELA purposes is on the relationship between the railroad and the worker. See Kelly, 419 U.S. at 323 (the standard for the "while employed" clause of FELA is proof of master-servant relationship between plaintiff and defendant railroad); Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1350 (3rd Cir. 1990) (the railroad's control over the employees is the emphasis in determining employer status under FELA).

Appellees argue that Appellants base their claim solely on the second theory of FELA liability, that they were acting for two masters simultaneously, and that the same rule of law therefore applies to both cases. There is no indication in the record, however, that this was Appellants' sole basis for establishing employment under FELA. Rather, the second amended complaint alleges that SFTS was controlled by Santa Fe, that Appellants were considered to be railroad employees, and that their workplace injuries prior to their discharge were handled "as FELA matters." Appellants do not, nor are they required to, identify in their complaint the particular legal theory on which they intend to proceed. See Crull v. Gem Ins. Co. 58 F.3d 1386, 1391 (9th Cir. 1995) ("The pleadings need not identify any particular legal theory under which recovery is sought."); Electrical Constr. & Maintenance Co. v Maeda Pac. Corp., 764 F.2d 619, 622-23 (9th Cir. 1985) ("A party does not need to plead specific legal theories in the complaint, as long as the opposing party receives notice as to what is at issue in the lawsuit."). The other two theories of FELA liability were not addressed in the WARN case.

Appendix I

Appellees argue that Appellants do not explain how the rule of law under FELA is different from that under WARN. The burden, however, is not on Appellants to explain the difference, but on Appellees to establish that it is the same. The burden is on the party asserting collateral estoppel to establish that the estopped issue is identical to the issue in the prior action. See Steen, 106 F.3d at 912.

The fourth factor favors Appellants because the claims are based on different events. The WARN claim was predicated on the insufficient notice of the mass layoff, whereas Appellants' FELA claim is based on injuries they allegedly suffered due to exposure to toxic chemicals and loud noises during the course of their employment.

The issue of whether or not SFTS and Santa Fe are a single employer is therefore not the same as the question of whether Santa Fe is Appellants' employer; accordingly, the district court erred in applying collateral estoppel to bar Appellants' FELA claim.

Conclusion

We **AFFIRM** the district court's grant of summary judgment in favor of Appellees on the ERISA claim. We **REVERSE** the dismissal of the FELA claim and **REMAND** for further proceedings. Each party shall bear his or its own costs on appeal.

APPENDIX II — ORDER OF THE DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JANUARY 22, 1999

Cause No. CV-92-6623 WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS L. FRANKS, ROBERT F. JAQUEZ, CHARLES I. JONES, TOMMIE MARTIN JR., AND ROBERT STEIN, et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, SANTA FE TERMINAL SERVICES, INC., a Delaware corporation, IN-TERMINAL SERVICES, INC., an Illinois corporation, and MI-JACK PRODUCTS, INC., an Illinois corporation,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DEFENDANTS' MOTION FOR ATTORNEYS' FEES

Plaintiffs' motion for reconsideration of the Court's Order granting defendants' motion for summary judgment came on regularly for hearing before this Court, the Honorable

William J. Rea presiding, on January 4, 1999. Concurrent therewith, the Court also heard the motion for attorneys' fees brought by Defendants The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services pursuant to 28 U.S.C. §1927. Appearing as counsel at the hearing on said motions was Ronald W. Novotny of Hill, Farrer & Burrill LLP for Defendants The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc.; Neil O. Andrus of Jeffer, Mangels, Butler & Marmaro, LLP for Defendants In-Terminal Services, Inc. and Mi-Jack Products, Inc.; and Richard E. Schwartz of the Midwest Center of Law & Justice and James Kropff of Girardi & Keese for plaintiffs Thomas L. Franks, et al.

Satisfactory proof having been made, good cause appearing, and in the interests of justice, the Court hereby Orders as follows:

The Court hereby denies plaintiffs' motion for reconsideration, and defendants' motion for attorneys' fees, for the reasons set forth in its tentative rulings on said motions which are attached hereto.

IT IS SO ORDERED.

DATED: 01/22/99 /s/William J. Rea
UNITED STATES DISTRICT JUDGE

Appendix II

Presented By:

HILL, FARRER & BURRILL LLP

By: /s/Ronald W. Novotny
Attorneys for Defendants
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO. AND
SANTA FE TERMINAL SERVICES, INC.

APPENDIX III — ORDER OF THE DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED DECEMBER 18, 1999

Cause No. CV-92-6623 WJR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS L. FRANKS, ROBERT F. JAQUEZ, CHARLES I. JONES, TOMMIE MARTIN JR., AND ROBERT STEIN, et al.,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, SANTA FE TERMINAL SERVICES, INC., a Delaware corporation, IN-TERMINAL SERVICES, INC., an Illinois corporation, and MI-JACK PRODUCTS, INC., an Illinois corporation,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The motion for summary judgment filed by Defendant The Burlington Northern and Santa Fe Railway Co., Santa Fe Terminal Services, Inc., In-Terminal Services, Inc. and Mi-Jack

Products, Inc. came on regularly for hearing before this Court, the Honorable William J. Rea presiding, on November 23, 1998. Appearing as counsel for Defendants The Burlington Northern and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc. was Ronald W. Novotny of Hill, Farrer & Burrill LLP; appearing as counsel for defendants In-Terminal Services, Inc. and Mi-Jack Products, Inc. was Neil O. Andrus of Jeffer, Mangels, Butler & Marmaro, LLP; and appearing as counsel for plaintiffs Thomas L. Franks, et al. were Richard E. Schwartz of the Midwest Center of Law & Justice and James Kropff of Girardi & Keese.

Satisfactory proof having been made, good cause appearing, and in the interests of justice, the Court hereby Orders as follows:

The Court previously rejected Defendants' Motion to Dismiss based on the statute of limitations because Plaintiffs pled that a written employment contract was at issue. Accordingly, the Court did not go beyond the pleadings to determine whether or not the claim was in fact founded in the contracts that were allegedly at issue.

Although Plaintiffs have pled that written employment contracts are at issue, Plaintiffs' pleadings and evidence are not sufficient to defeat summary judgment based on the statute of limitations. To invoke the four-year, contract-based, statute of limitations, "[i]t is not sufficient that the cause of action is in some way remotely or indirectly connected with an instrument in writing or that the instrument is a link in the chain establishing the cause of action. The instrument itself must contain the contract to do the thing for the nonperformance of which the action is sought." Citizens Casualty Company of New York v. Otis Clark & Co., 19 Cal.App.3d 294, 299 (1971).

Furthermore, the Ninth Circuit has recently clarified that "[w]hat is significant for the statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct." Burrey v. Pacific Gas & Electric Co., ___ F.3d ___, 1998 WL 727284 *8 (9th Cir. Oct. 20, 1998).

The primary interest allegedly invaded by Defendants' wrongful conduct is not anything that is founded in the written contracts that Plaintiffs refer to in their Second Amended Complaint. The primary interest that Defendants have allegedly violated relates to the personal rights protected by § 510 of ERISA.

The Burrey case is on point. There the one-year statute of limitations that governs actions brought for wrongful termination in violation of public policy, which is embodied in California Code of Civil Procedure § 340(3), was found to apply to an action under § 510 of ERISA. In Burrey and in the instant case, "the gravamen of the

wrongful termination action is the violation of some personal right considered to be of fundamental public importance, protected or guaranteed either by statute or the Constitution ...." Burrey, 1998 WL 727284 *8 (citing Barton v. New United Motor Mfg., Inc., 43 Cal.App.4th 1200, 1207-09 (1996)).

Since Plaintiffs have not shown that their cause of action is founded in the written contracts related to their employment, the statute of limitations for wrongful termination based on contract is not applicable to their claim. The analogous State cause of action is wrongful termination in violation of public policy which is governed by California Code of Civil Procedure § 340(3). Therefore, the Court finds that Plaintiffs' ERISA claim is subject to a one-year statute of limitations.

Plaintiffs were discharged from their employment with Defendant SFTSI on March 31, 1990. This action was not commenced until July 17, 1992. Therefore, the Court hereby grants Defendants' Motion for Summary Judgment on the ground that Plaintiffs' § 510 ERISA claim is barred by the applicable statute of limitations.

Based on the foregoing, Plaintiffs' Motion for Class Certification is denied on the ground that it is moot.

Plaintiffs may move for reconsideration on this Order no later than December 3, 1998.

Appendix III

IT IS SO ORDERED.

DATED: 12/17/98 /s/Judge William J. Rea
UNITED STATES DISTRICT JUDGE

Presented By:

HILL, FARRER & BURRILL LLP

By: /s/Ronald W. Novotny
Attorneys for Defendants
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY CO. AND
SANTA FE TERMINAL SERVICES, INC.

APPENDIX IV — INTER-MODAL RAIL EMPLOYEES ASSOCIATION MEMBERSHIP LIST

Thomas L. **FRANKS**
Charles I. **JONES**
Tommie **MARTIN**, Jr.
Hoyt D. **JARRARD**, Sr.
Robert **STEIN**
Robert F. **JAQUEZ**

Elias P. **AGUIRRE**
Martin F. **ALARID**
Keith F. **BAKER**
Robert E. **BAKER**
Jerry D. **BAUER**
Jack P. **BLAKE**
Richard B. **BOYLE**
Danny R. **BREWER**
Phillip E. **BURNS**
Andrew **BYON**
Maria C. **CARDENAZ**
Steve **CLARK**
Carl L. **COOK**
William **CORSO**
Chris L. **COX**
Frank M. **DAVIES, SR.**
Gilbert **DELGADO**
Silviano Sal **DIAZ**
Lloyd C. **EASTERLY**
James E. **ESTES**
Nick **FIGUEROA**
Roy O. **FREASE**
Alfredo R. **FRESQUEZ**
Marguerite **FRYER**
Ralph M. **GARCIA**
Robert B. **GARCIA**
Ralph **GASTELUM**
Robert V. **GIBBS**
Conrad **GOMEZ**
Guadalupe **GONZALES**
Kelsey **GREEN**
Lawrence E. **GREEN**
Robert T. **GULLEY**
John A. **HERNANDEZ**
John D. **KAOPUIKI**
Edward C. **KEMA**
Frank **LAMBERT**
Herbert H. **LEGGINS**
Richard **LOPEZ**
James R. **McCOVERY**
Travis **McDONALD**
Alejandro A. **MEDRANO**
Juan **MODZELEWSKI**
Crespine A. **MOJICA**
Karl **MONTOYA**
Frank **MORALES**, Jr.
Donald E. **NELSON**
Reynaldo **PADUANI**
Danny A. **PARKER**

Appendix IV

David J. **PARKER**
Randy R. **PARKER**
Troy J. **PERKINS**
Wesley R. **PIERCE**
Richard A. **PURATY**
Paul J. **QUINTERO**
Bill L. **REES**
Larry D. **RICHEY**
Joel **RODARTE**
Osvaldo **RODARTE**
Stephen R. **SANCHEZ**
William F. **SMILEY**
Edward C. **SUTTON**
Silvano C. **TELLECHEA**
John W. **TIFFANY**
Edward A. **TORRIJOS**
Don B. **TUCKER**, Sr.
Elizabeth **WEXLER**
Jimmy J. **WHEELER**
Steven G. **WHITE**
Richard L. **WIBLE**
Gloria **WILBURN**
Raymond A. **WOODS**